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Supreme Court of the United States,

OCTOBER TERM, 1929.

No. 344.

CHARLES A. CORLISS,
Plaintiff-Appellant.

against

FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
Defendant-Respondent.

REPLY BRIEF FOR APPELLANT.

JOSEPH M. HARTFIELD,
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A. C. NEWLIN,
Of Counsel.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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The argument of the Respondent is based largely upon the theory that "up to the very moment when each individual payment of income was made to petitioner's wife the gift to her was incomplete; it was not beyond the control of petitioner until she actually received it." (Respondent's Brief, pp. 10-11.) Respondent cites no direct authority for this proposition. Appellant contends that it is not the law.

According to Respondent's contention, if income is received by the trustee of a revocable trust and, before being paid over to the beneficiary, the trust is completely revoked, such accumulated income goes to the donor even though he is not the beneficiary. The consequences of such a proposition are startling. If such a trust deed made no provision for time of payment and the trustee, for one reason or another, failed to make payment currently as such income was received, such action on the part of the trustee would

determine the respective rights of the donor and beneficiary to the income. Needless to say, the trustee has no such power. Dates of payment are fixed merely as a matter of administrative convenience. It cannot be doubted that they are not in the least effective in fixing the respective rights of the parties.

The terms of the revocation clause of the trust indenture here involved (R., 12-13) are not broad enough to reach income received by the trustee or accrued and not paid over to the beneficiary at the time of revocation. The power of the donor to retake is limited to the "trust fund". No mention is made of distributable income. To construe the term "trust fund" as including accumulated but undistributed income would make the trust illegal in New York since it would then be in conflict with the statute against accumulations. (Consolidated Laws, Ch. 41, Sec. 16. (Personal Property Law)*) Under paragraph First of the trust indenture (R., 9) distributions of income were to be made quarterly. Therefore, the trust deed in effect would permit accumula-

* § 16. *Validity of directions for accumulation of income.* An accumulation of the income of personal property, directed by any instrument sufficient in law to pass such property is valid:

1. If directed to commence from the date of the instrument, or the death of the person executing the same, and to be made for the benefit of one or more minors, then in being, or in being at such death, and to terminate at or before the expiration of their minority.

2. If directed to commence at any period subsequent to the date of the instrument or subsequent to the death of the person executing it, and directed to commence within the time allowed for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and to terminate at or before the expiration of their minority.

3. All other directions for the accumulation of the income of personal property, not authorized by statute, are void. In either case mentioned in subdivisions one and two of this section a direction for any such accumulation for a longer term than the minority of the persons intended to be benefited thereby, has the same effect as if limited to the minority of such persons, and is void as respects the time beyond such minority. (Here follow irrelevant provisos.)

tions of at least two months and twenty-nine days, and hence would violate the above-mentioned statute. *Matter of Dexter,* 134 Misc. 195 (N. Y.), *Matter of Lamb,* 182 App. Div. 180, aff'd. 224 N. Y. 577. The trust instrument is not to be construed in such manner as to render it illegal when another construction, consistent with its validity, is clearly permissible. *Border National Bank* v. *American National Bank,* 282 Fed. 73 (C. C. A., 5th Circ.), certiorari denied 260 U. S. 701.

Not only was the beneficiary entitled to the income as it was received by the trustee, but her rights thereto became vested, without possibility of divestment, as such income accrued, under Section 204 of the New York Surrogate's Court Act.*

Respondent presumably relies on certain statements from the opinions of the Circuit Court and of the District Court for his contention that the beneficiary has no interest in the income until actually paid over. (See Respondent's Brief, pp. 7-8.) Such statements, however, clearly contemplate an amendment to the trust deed to the extent of making the donor the beneficiary. They are no authority for the position that the donor, when not a beneficiary, could take for himself income either accrued or received by the trustee

* 204. *Apportionment of rents, annuities and dividends.* All rents reserved on any lease made after June seventh, eighteen hundred and seventy-five, and all annuities, dividends and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect after such date, shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from or in respect to which the same issue or are derived, or on the determination by any other means of the interest of any such person, he, or his executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of such person, or of the determination of his or her interest, after making allowance and deductions on account of charges on such rents, annuities, dividends and other payments. Every such person or his executors,

but not paid over to the beneficiary. Indeed, the District Court was careful to note (R., 25) that "the trust property may of course by a proper instrument be sold by the settlor or the income therefrom transferred *before its accrual* to a third person, such acts being implied assertions of his unqualified right to repossession." (Italics ours.)

It is therefore submitted that the powers of the Appellant under the revocation clause of the trust indenture related only to the principal and not to the income of the trust, and that since this tax is concerned with income, the lower courts' decisions should be reversed.

Respondent cites *In re Mayo's Will,* 136 N. Y. Sup. 1066, as authority for the applicability of Section 145 of the Real Property Law of New York. (Respondent's Brief, p. 14) The cases relied upon by Surrogate Fowler in that decision as authority for his statement that powers connected with personal property are co-extensive with powers in the law of real property in New York, were all decided before the amendment to Section 130 of the Real Property Law in the Consolidation of 1909 (see Appellant's Brief, pp. 10-11) and the Surrogate made no reference to said Section 130 when making his pronouncement. It is submitted that the accuracy of such statement of the rule of law therefore may be questioned.

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administrators or assigns shall have the same remedies at law and in equity for recovering such apportioned parts of such rents, annuities, dividends and other payments, when the entire amount of which such apportioned parts form part, becomes due and payable and not before, as he or they would have had for recovering and obtaining such entire rents, annuities, dividends and other payments, if entitled thereto; but the persons liable to pay rents reserved by any lease or demise, or the real property comprised therein shall not be resorted to for such apportioned parts, but the entire rents of which such apportioned parts form parts, must be collected and recovered by the person or persons who, but for this section, or chapter five hundred and forty-two of the laws of eighteen hundred and seventy-five, would have been entitled to the entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this section. This section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description.

Respondent cites *United States* v. *Robbins*, 269 U. S. 315 (Respondent's Brief, p. 12). That case has already been considered in Appellant's main brief (pp. 17-19). In this connection, the Court's attention is called to the decisions of the Circuit Court of Appeals for the Fifth Circuit in the cases of *Bender* v. *Pfaff* and *Hopkins* v. *Bacon*, decided February 28, 1930, wherein it was held that *United States* v. *Robbins* was not applicable under the Community Property Laws of the States of Louisiana and Texas, respectively, since under the laws of said states the interest of the wife in the community income was substantial. The District Court of the United States for the Western District of Washington in the case of *Seaborn* v. *Poe*, 32 Fed. (2d) 916, has reached a similar conclusion with respect to the Community Property Law of the State of Washington. The facts of these cases are much more analogous to the instant situation than the facts in *United States* v. *Robbins*.

The United States Circuit Court of Appeals for the Seventh Circuit on February 28, 1930 handed down an opinion in the case of *Maud Dunlap Shellabarger* v. *Commissioner*, which is very significant. Petitioner's father died testate and by his will created two trusts, the entire income from which was to be paid to his daughter Maud except for certain payments, including $100 a month to his daughter Georgia. Georgia, dissatisfied with the provisions of her father's will, notified the other beneficiaries of her intention to contest it. Negotiations between the sisters ensued, resulting in a written contract whereby, in consideration of Georgia's abandonment of her threatened contest of the will, Maud agreed to give her half of an outright legacy and, as received, to pay to her during her lifetime three-tenths of the net income of the trust and one-fifth to a bank as trustee for the use of Georgia's descendants. There was a provision for reversion to Maud in case of Georgia's death leaving no descendants and also for cancellation of the contract in case Georgia failed to abide by its terms. The Court held that Maud was not liable to tax on the income received by her sister Georgia

under the contract. In the course of its opinion the court said:

> "Income taxes look to the period for which they are imposed, and operate upon income accrued and paid to the taxpayer as income to the taxpayer within that period. That in some subsequent tax year conditions might come into existence under which Maud would again have for her own use a greater part, or even the whole, of the net income from the testamentary trusts, is wholly beside the question in determining her taxable income for the year 1924. In that year it appears that not only was Georgia and the bank lawfully entitled under the contract to demand and receive to their respective uses the half of the net income from these trusts, but they actually did so then receive it."

And Appellant submits that it is beside the point to argue on the basis of what he might have done during the year 1924 in the way of modifying the trust deed since, under the actual facts, from the moment any income accrued on the trust principal the beneficiary was lawfully entitled to such income for her individual use, and she actually did receive it.

Respectfully submitted,

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